(2)

No. 08-1580

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN SANDOVAL,

Petitioner,

v.

LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Los Angeles County Code (1) provides that a County employee who is absent without authorization for three working days or two consecutive on-duty shifts is deemed to have resigned, and (2) directs the County to notify the employee that failure to resume working will be deemed a resignation, but (3) states that failure to provide notice will not vitiate the resignation. The California Court of Appeal ruled that the provision did not purport to do away with the County's due process obligation to provide notice and an opportunity to be heard *after* determining that the employee is deemed to have resigned. Does the Code provision present a due process issue for this Court to review?

2. A municipality may be liable under 42 U.S.C. § 1983 for the discharge of a public employee if it results from unconstitutional conduct by officials with policymaking powers. There was no evidence that the County's policymaking body, the Board of Supervisors, had delegated its policymaking authority to the subordinate official who terminated Petitioner's employment. Is there any basis for imposing section 1983 liability on the County?

3. This Court has consistently declined to apply the Seventh Amendment to state court proceedings. Petitioner asks the Court to impose a duty on state courts under the Seventh Amendment to inquire into juror misconduct sua sponte. Is there any reason for the Court to depart from its previous decisions and apply the Seventh Amendment as Petitioner requests?

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TREATISE

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OPINIONS BELOW

A portion of the California Court of Appeal's opinion (Pet. App. 1a-45a) is reported at *Sandoval v. Los Angeles County Dept. of Public Social Services*, 87 Cal. Rptr. 3d 334 (2008), *review denied* (Cal. 2009). The Los Angeles Superior Court's decision denying Petitioner's new trial motion (Pet. App. 46a-51a) is unreported.

JURISDICTION

The California Court of Appeal entered its judgment on December 19, 2008. The California Supreme Court entered an order denying discretionary review on March 25, 2009. (Pet. App. 53a.) The petition for a writ of certiorari was filed on June 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Background facts

The Los Angeles County Department of Public Social Services discharged Petitioner from his position as an eligibility worker. The County Civil Service Commission ordered him reinstated once his pending workers compensation case was resolved, and he was declared fit to return to work. (Pet. App. 4a-5a.) The Department sent Petitioner three notices that asked

him to report to work, the final one of which stated that he would be deemed to have resigned under the County Code if he did not return by a date certain. The notices were directed to the address of record that Petitioner had provided to the Department. Petitioner did not report as requested, and the Department deemed him to have resigned. (Pet. App. 5a-9a.)

Petitioner reported for work eight months later, after final disposition of his workers compensation case, but the Department told him that he was deemed to have resigned for failure to respond to the three notices. He claimed that he never got the notices because he had moved from his address of record. (Pet. App. 6a.)

Petitioner filed a lawsuit in the Los Angeles Superior Court, which included a claim under 42 U.S.C. § 1983 that the County had deprived him of due process of law. That claim (which did not name any individual defendants) provides the basis for the present petition.

The County Code "deemed resigned" provision

Los Angeles County Code section 5.12.020 (*see* Pet. App. 54a-55a) provides that a County employee "who without prior authorization is absent or fails to discharge [h]is regularly assigned duties for either three consecutive regular working days or for two consecutive regularly scheduled on-duty shifts . . . shall be deemed to have resigned effective as of the

end of the day of which he last performed any of the duties of his position." Anyone deemed to have resigned under that provision may obtain reinstatement by showing a reason beyond his control for the absence. An employee may also seek relief from the Civil Service Commission if he claims that his resignation was obtained by fraud, duress or undue influence.[1]

Section 5.12.030 (*see* Pet. App. 55a-56a) requires the "appointing officer" for an employee affected by the "deemed resigned" provision to serve the employee with a notice stating that failure to return to work shall constitute a resignation. The section also states that failure to give such written notice "shall not cause such resignation to be ineffective."

The California Court of Appeal, relying on a California Supreme Court decision,[2] recognized that due process principles require notice and an opportunity to be heard before a public employer may deem an employee to have resigned because of unauthorized absences. (*See* Pet. App. 15a-17a.) According to the Court of Appeal, the absence of express procedural protections in the deemed resigned statute did not invalidate the statute, because the statute did not instruct County officials to ignore their due process obligations. The statute may be invoked to deem an employee resigned, so long as due process requirements

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[1] L.A. County Code § 5.12.040.

[2] *Coleman v. Department of Personnel Administration*, 805 P.2d 300 (Cal. 1991).

are otherwise met. (*See* Pet. App. 20a-22a.) Petitioner did not contend, and there was no evidence, that the County had a custom or policy of denying employees subject to automatic resignations the procedural protections required by the due process clause. (*See* Pet. App. 22a, n. 14.)

Facts related to the policymaker issue under section 1983

California law makes a county's Board of Supervisors the body authorized to promulgate rules and policies regarding county employees.[3] To support an argument that the Los Angeles County Board of Supervisors had delegated its policy-making power, Petitioner called a County employee who testified that her superior decided to terminate Petitioner, and that the superior received his authority from the Director of the Department. There was no evidence of any action by the Board of Supervisors to delegate its policy-making power, or to ratify Petitioner's discharge. (*See* Pet. App. 23a-24a.)

Alleged juror misconduct

Petitioner sought a new trial on the ground that two jurors supposedly concealed biases during voir dire, and later disclosed them in letters to the trial

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[3] *See Marcario v. County of Orange*, 65 Cal. Rptr. 3d 903, 910 (Cal. Ct. App. 2007).

court. One of the jurors also openly read a newspaper during the presentation of evidence. The trial court denied the new trial motion on the ground that Petitioner's attorney had not raised a material challenge during the trial, when there was a chance to cure any misconduct that may have taken place. (Pet. App. 48a-50a.) The California Court of Appeal agreed. (Pet. App. 37a-41a.)

ARGUMENT

1. The County Code deemed resigned provision does not raise a due process issue suitable for this Court's review

Because Petitioner only named the County as a defendant in his section 1983 claim, he was required to prove that an official County policy or custom deprived him of due process in order to prevail.[4] Although he argued that the County Code provisions constituted such a policy, the California Court of Appeal did not interpret the provision as Petitioner contended. The court ruled that the failure of the statute to specify a notice and hearing procedure was not a direction to County officials to dispense with such a procedure, and, therefore, was unrelated to the notice requirement of due process.

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[4] *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-95 (1978).

According to the Court of Appeal: "Nothing in section 5.12.030 – including the final sentence – purports to relieve the employer of the duty to provide the employee with notice and an opportunity to challenge the employer's factual determinations after the employer has found that the factual basis for a resignation exists, namely, that the employee has been absent for the pertinent period." (Pet. App. 21a.) Therefore, under the state law applied by the Court of Appeal, the County Code provision is not a policy that could deprive Petitioner of due process.

Because the state court determined that the provision does not require or authorize County officials to ignore their due process obligations, there is an adequate and independent state ground for the decision.[5] As the authors of the preeminent treatise on federal practice and procedure have explained: "Review is thus precluded if state substantive law is sufficient to support the judgment no matter how the federal question is resolved, or if the state courts have found adequate procedural reasons for refusing to decide the federal question."[6] There is no basis for this Court to review the constitutionality of the

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[5] *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground").

[6] Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice & Procedure* § 4019 (2d ed. 1989).

County Code provisions, because state substantive law is sufficient to support the Court of Appeal's judgment.

2. The Petition does not raise a substantial question as to municipal liability under 42 U.S.C. § 1983 for the termination of Petitioner's employment

Although actions by municipal policy makers may satisfy the requirement for proof of government action under section 1983, "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered."[7] In the County of Los Angeles, the Board of Supervisors is the body authorized by state law to set policy on personnel matters.[8] As the California Court of Appeal has explained, "civil service rules, adopted by the county's board of supervisors pursuant to the California Constitution and the County's Charter, have the force and effect of law, and give the County the exclusive right to . . .

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[7] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986).

[8] *Hyland v. Wonder*, 117 F.3d 405, 414 (9th Cir. 1997) ("Under California law, a city's [or county's] Charter determines municipal affairs such as personnel matters"), citing *City and County of San Francisco v. Patterson*, 248 Cal. Rptr. 290, 294-95 (Cal. Ct. App. 1988). *See also Bouman v. Block*, 940 F.2d 1211, 1230-31 (9th Cir. 1991).

determine the methods, means and personnel by which the county's operations are to be conducted."[9]

Petitioner contends that the Board of Supervisors delegated its powers to the Director of the Department, making him a decision maker who could set County policy. The Court of Appeal rejected that argument because Petitioner did not identify any evidence that the Board had in fact delegated its policymaking authority. (Pet. App. 24a.) The Petition points to a County Code provision that defines "management employee,"[10] but does not explain how that definition constitutes a delegation of policymaking authority.

In any event, Petitioner's arguments on the issue do not identify an important federal question that warrants this Court's review. Petitioner argues that the Court of Appeal is wrong, and that he did provide sufficient evidence of delegation. That is at most a

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[9] *Marcario*, *supra*, 65 Cal. Rptr. 3d at 910, citing *DeCuir v. County of Los Angeles*, 75 Cal. Rptr. 2d 102, 105-06 (Cal. Ct. App. 1998).

[10] County Code § 5.04.030(L) states:

> "Management employee" means any employee having significant responsibilities for formulating and administering county policies and programs, and includes the chief administrative officer, department heads, and any other employees who are so designated by the director of personnel based upon the recommendation of the department head or department heads concerned. For the purpose of this chapter, such persons shall not exceed two percent of the total number of full-time employees of the county.

request that the Court correct a state court error in assessing the evidence, and not a request to resolve an important unsettled issue of constitutional law.

3. Petitioner's arguments concerning alleged juror misconduct do not raise an important constitutional question

For well over a century, this Court has ruled that the Seventh Amendment only governs proceedings in federal courts, not those in state courts.[11] State courts are free to regulate trials by jury under their own standards and rules. Petitioner has not provided any compelling reason for the Court to reconsider its long-standing approach.

Although the Court has recognized that due process requires an impartial jury, the applicable standard has been established for some time,[12] and is

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[11] *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("The Seventh Amendment, which governs proceedings in federal court, but not in state court"); *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) ("the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same"); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way").

[12] *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen"); *McDonough Power Equipment,*

(Continued on following page)

quite deferential to the trial courts' assessments of misconduct.[13] Petitioner would like the Court to establish a rule that judges presiding over state court civil trials must *sua sponte* inquire into evidence of possible juror misconduct as soon as they become aware of it, but cites no authority from this Court that would support such a rule. Indeed, in *Smith*, the Court ruled that, even in a criminal case, due process is satisfied by a post trial inquiry into juror misconduct.[14]

Inc. v. Greenwood, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it' ").

[13] *McDonough Power Equipment, supra*, 464 U.S. at 552 ("Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load.")

[14] *Smith, supra*, 455 U.S. at 218 ("It seems to us to follow 'as the night the day' that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system").

CONCLUSION

Petitioner believes that the California Court of Appeal made errors. Although he would like this Court to correct them, he has not identified any issues that warrant this Court's review. His due process attack on the Los Angeles County Code is barred by an adequate and independent state ground for the decision, because the state court ruled that the challenged provision did not purport to do away with the notice and hearing required by due process. His request for review of the state court's ruling on delegation of policy-making authority does not raise an important or novel issue. His suggestion for imposing a federal jury misconduct standard on state civil proceedings through the Seventh Amendment lacks any legal support. The Court should deny the Petition.

Respectfully submitted,

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